Supreme Court, U.S.
FILED
AUG 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2007

In The Supreme Court
OF THE
United States

OCTOBER TERM, 1987

COLONIAL PIPELINE COMPANY,
Appellant,

v.

WRIGHT CONTRACTING COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

APPELLANT'S REPLY BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

*HAROLD N. HILL, JR.
KENNETH L. KARLBERG
HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
1400 Peachtree Place Tower
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Attorneys for Appellant

*Counsel of Record

Of Counsel:
ROSS ARNOLD
ARNOLD & HOPKINS
Suite 1607, 3400 Peachtree Road, N.E.
Atlanta, Georgia 30326

JAMES V. DAVIS
LANDAU, DAVIS AND FARKAS, P.C.
Albany Towers, Suite 300
P.O. Box 128
Albany, Georgia 31702

EDGAR A. NEELY, III
RICHARD B. NORTH, JR.
NEELY & PLAYER
Haas-Howell Building
75 Poplar Street
Atlanta, Georgia 30303-2122

TABLE OF AUTHORITIES

Cases

	Page
Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960)	6
Abney v. United States, 431 U.S. 651 (1977)	9
Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986)	8
Bankers Life and Casualty Co. v. Crenshaw, U.S. , 108 S.Ct. 1645 (1988)	3,4,8
Chambers v. Mississippi, 410 U.S. 284 (1973)	4
Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co., 260 U.S. 35 (1922)	5,6
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	7,8
Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967)	6
Day v. Woodworth, 13 How. 363 (1851)	5
Fay v. Parker, 53 N.H. 342 (1873)	6
Hicks v. Miranda, 422 U.S. 332 (1975)	10
Illinois v. Gates, 462 U.S. 213 (1983)	4
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	7
Lawrence v. State Tax Comm'r., 286 U.S. 276 (1931)	3,4
Life & Casualty Ins. Co. of Tenn. v. McCray, 291 U.S. 566 (1934)	6
Louis Pizitz Dry Goods Co., Inc. v. Yeldell, 274 U.S. 112 (1927)	6
Minneapolis & St. L. Ry. Co. v. Beckwith, 129 U.S. 26 (1889)	5
Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512 (1885)	4,5
Missouri Pac. Ry. Co. v. Tucker, 230 U.S. 340 (1913)	5

	Page
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	4
Rogers v. Alabama, 192 U.S. 226 (1904)	4
Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482 (1915)	5
Standard Oil Co. v. Missouri, 224 U.S. 270 (1912)	5
St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63 (1919)	5
Street v. New York, 394 U.S. 576 (1969)	4
Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909)	5
U.S. Constitutional Provisions	
U.S. Const. Amend. XIV § 1 (Due Process Clause)	*passim*
U.S. Const. Amend. XIV § 1 (Equal Protection Clause)	*passim*
Federal Statutes	
28 U.S.C. § 1257	7,8,10
State Statutes	
Official Code of Georgia Annotated (O.C.G.A.) § 51-12-5 (1982)	*passim*
Official Code of Georgia Annotated (O.C.G.A.) § 51-12-5.1 (1987)	7
Other Authorities	
Beckman, *Constitutional Issues in Insurance Claim Litigation*, 22 Tort & Ins. L.J. 244 (1987)	6
Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chi. L. Rev. 408 (1967)	7
Comment, *Punitive Damages: The Burden of Proof Required by Procedural Due Process*, 22 U.S.F. L. Rev. 99 (1987)	7
Ghardi & Kircher, *Punitive Damages Law and Practice* (1985)	6

	Page
Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const. L.Q. 241 (1985)	6
Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986)	7
Leitner, *Punitive Damages: A Constitutional Assessment*, 38 Fed'n Ins. & Corp. Couns. Q. 119 (1988)	7
Peterson, Sarma, & Shanley, *Punitive Damages: Empirical Findings*, Rand Corp., Institute for Civil Justice, Report No. R-3311-ICJ (1987)	8
Reisberg, *In Defense of Punitive Damages*, 55 N.Y.U. L. Rev. 303 (1980)	7
R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	4
Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983)	7

APPELLANT'S REPLY BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS

Appellee's Motion to Dismiss is based upon three grounds, as follows:

(1) The appeal is not within the Court's jurisdiction because the judgment sought to be appealed is not final;

(2) The record is inadequate because the constitutional issues were not expressly passed upon by the court below; and

(3) Appellant received exactly the relief it sought in the state court, a new trial.

These grounds will be considered in reverse order after the status of this case is briefly reexamined.

The jury returned a $5,000,000 punitive damage award against Colonial Pipeline Company based upon its passive negligence resulting in property damage to Wright Contracting Company's $53,000 bulldozer. Colonial appealed to the Supreme Court of Georgia urging, first, that the evidence was insufficient to support a verdict against Colonial and was particularly insufficient to support a verdict awarding punitive damages against Colonial; second, that the $5,000,000 punitive damage award was excessive, under existing [common law] standards, as a matter of law; and third, that Georgia's punitive damages statute, O.C.G.A. § 51-12-5, and the $5,000,000 punitive damage award are unconstitutional and void as denials of due process and equal protection guaranteed by the Fourteenth Amendment and the Constitution of Georgia, and because the statute permits and the verdict and judgment constitute an excessive fine in contravention of the Eighth Amendment and its counterpart, Art. I, Sec. I, Par. XVII, in the Georgia Constitution.[1]

---

[1]A plurality of the Supreme Court of Georgia found the $5,000,000 punitive damage award to be an excessive fine under the state constitution and the case was remanded for a new trial as to punitive damages. Colonial had urged additional errors in the court below not pertinent here.

If the Georgia statute which allows punitive damages, O.C.G.A. § 51-12-5, *supra*, were declared unconstitutional and void as violative of due process and equal protection, as urged by Colonial, there could be no recovery of punitive damages in this case, as Colonial pointed out to the Georgia Supreme Court (J.S. App. A-33).

In the trial court Colonial had moved to dismiss that count of Wright's complaint seeking punitive damages (J.S. App. A-20). During the trial, it had moved for directed verdicts disallowing punitive damages based upon the Due Process and Equal Protection Clauses of the Fourteenth Amendment (J.S. App. A-24 and A-25). Following the trial it had moved for judgment notwithstanding the verdict on those same grounds (J.S. App. A-28). On appeal, it urged the enumerations of error set forth above, and following the decision of the court below it moved for rehearing, pointing out that a favorable ruling on its due process and equal protection attacks upon the statute would obviate the necessity for a new trial (J.S. App. A-33).

A.

Therefore, for Wright to urge before this Court that "The Appellant Received Exactly the Relief It Sought in the State Court" (Motion to Dismiss, Section III, p. 12), namely: a new trial, shows at least a complete failure to recognize the relief Colonial has sought throughout this litigation, to wit: a determination that O.C.G.A. § 51-12-5, pursuant to which punitive damages are allowed in Georgia, violates, *inter alia*, the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Thus, the third ground of Wright's Motion to Dismiss is not in accord with the record. Moreover, the fact that a party obtained partial relief in the court below, but not the relief sought as to the federal constitutional issues raised, is not a ground on which to dismiss an appeal.[2] Ground three (3) of Wright's Motion to Dismiss therefore is without merit.

---

[2]Where a party obtains partial relief, a question of finality (discussed below) may arise, but not a question of "satisfaction" or "estoppel", as appellee implies.

B.

Regarding ground two (2) of Wright's Motion to Dismiss, the Supreme Court of Georgia did pass upon these constitutional issues (and Wright does not dispute that it did). It ordered Colonial to return to the trial court for a new trial as to punitive damages. If, as Colonial contends, O.C.G.A. § 51-12-5 is a violation of the Fourteenth Amendment, then punitive damages are not allowable in this case and there is no need for a new trial. By remanding this case for retrial as to punitive damages, the Georgia Supreme Court necessarily passed upon and upheld the validity of O.C.G.A. § 51-12-5, *sub silentio.*

As rightly held in *Lawrence v. State Tax Comm'r.*, 286 U.S. 276, 282 (1931), a person's "... constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it ...." The Supreme Court of Georgia's refusal to acknowledge that by ordering a new trial as to punitive damages, it was upholding the validity of the statute authorizing punitive damages cannot defeat this Court's jurisdiction. See *Banker's Life and Casualty Co. v. Crenshaw*, U.S. , 108 S.Ct. 1645 (1988), where the Court decided the validity of a state statute notwithstanding the absence of an opinion by the Mississippi Supreme Court upholding its validity.

Wright urges that Colonial has sought and obtained "clarified standards" and "new guidelines" (Motion to Dismiss, pp. 12 and 13). While Colonial disputes the adjectives, it rejects the nouns. Colonial seeks a determination that punitive damages as allowed by O.C.G.A. § 51-12-5 constitute a denial of due process and equal protection to Colonial and are not recoverable by Wright. While the result of this Court's decision should be "clarified standards" and "new guidelines" for others, for Colonial and Wright this Court's decision in favor of Colonial will end this litigation.[3]

---

[3]Wright argues that the court below altered its interpretation of Georgia's punitive damages statute and issued new criteria which will be applicable at the retrial (Motion to Dismiss, p. 8). Such new criteria are inapplicable, Colonial contends, because the statute interpreted by the court below is unconstitutional.

Wright also argues that the Court does not have the benefit of an opinion by the court below addressing the constitutional issues raised (Motion to Dismiss, p. 8). The absence of an opinion by the court below discussing the constitutional issues is not grounds for dismissing an appeal. See *Rogers v. Alabama*, 192 U.S. 226, 229-230 (1904); *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Street v. New York*, 394 U.S. 576, 581-582 (1969); *Chambers v. Mississippi*, 410 U.S. 284, 290 n.3 (1973). As stated in *Zimmerman, supra*, 278 U.S. at 67: "Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough [footnoted citations omitted]." See also *Lawrence v. State Tax Comm'r., supra; Banker's Life and Casualty Co. v. Crenshaw, supra.*[4]

Moreover, the Court need not be concerned that there are no authorities discussing the issues, because such authorities do exist. In addition to the many cases discussing the requirements of due process and equal protection (e.g., the requirement of notice and the void for vagueness cases), there are numerous decisions of this Court considering the validity of punitive damages and other penalties. In the first such case, the Court in *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512 (1885), upheld the validity of a statute authorizing exemplary or additional damages by way of punishment (double actual damages) for a railroad's failure to fence its track, resulting in injury to horses, cattle or mules, where the legislature fixed the amount of such damages or prescribed the limit within which the jury could exercise its

---

[4]Appellee misinterprets the "not pressed or passed upon" rule (Motion to Dismiss, p. 7). This Court has jurisdiction if the constitutional issue was either pressed or expressly passed upon in the court below. It is not necessary to the Court's jurisdiction that such issue be both pressed and expressly passed upon by the court below. *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 150 (6th ed. 1986).

discretion. *Humes*, 115 U.S. at 522.[5] See also *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 34 (1889). In O.C.G.A. § 51-12-5, the Georgia legislature has neither fixed the amount of, nor prescribed the limits of, punitive damages.

In *Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340 (1913), the Court held invalid a statute which imposed a $500 penalty upon common carriers transporting oil, gasoline, etc., intrastate and charging a rate in excess of that fixed by law. The railroad charged Mr. Tucker $3.02 more than the law authorized and was assessed the $500 penalty. Because the law provided no mechanism for the railroad to challenge the validity of the statutory rate, the Court found: "As applied to cases like the present, the imposition of $500 as liquidated damages is not only grossly out of proportion to the possible actual damages, but is so arbitrary and oppressive that its enforcement would be nothing short of the taking of property without due process of law, and therefore in contravention of the 14th Amendment." *Tucker*, 230 U.S. at 351. Compare *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919).

In *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482 (1915), the Court found that a penalty of $6,300 ($100 per day for 63 days) imposed upon a telephone company "... was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law". *Danaher*, 238 U.S. at 491. But see *Standard Oil Co. v. Missouri*, 224 U.S. 270 (1912)(penalty of $50,000 upheld); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909)(penalty aggregating $1,549,500 upheld).

In *Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co.*, 260 U.S. 35 (1922), the Court collected and analyzed the cases imposing penalties and attorney fees upon railroads for failure to promptly pay claims and concluded that a reasonable penalty may

---

[5]The earlier case of *Day v. Woodworth*, 13 How. 363 (1851), is sometimes cited as upholding the constitutionality of punitive damages. That case, however, dealt with the correctness of the district court's jury instructions as to punitive damages, not their constitutionality.

be imposed upon them, saying: "But it is also apparent from these cases that such penalties or fees must be moderate and reasonably sufficient to accomplish their legitimate object and that the imposition of penalties or conditions that are plainly arbitrary and oppressive and 'violate the rudiments of fair play' insisted on in the Fourteenth Amendment, will be held to infringe it." *Nye-Schneider-Fowler Co.*, 260 U.S. at 44.

In *Louis Pizitz Dry Goods Co., Inc. v. Yeldell*, 274 U.S. 112 (1927), the Court upheld the validity of a wrongful death statute which authorized a jury to assess punitive damages against an employer for the mere negligence of its employee.

In *Life & Casualty Ins. Co. of Tenn. v. McCray*, 291 U.S. 566 (1934), the Court approved a statute imposing a 12 percent penalty, plus attorney fees, upon a life insurance company's good faith refusal to pay the proceeds of a policy, saying: "The Fourteenth Amendment does not prohibit a fixed award of damages, moderate in amount, in addition to the costs and the fees of the attorney, when the payment of a policy of life insurance has been wrongfully refused." *McCray*, 291 U.S. at 570.

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 159 (1967), the Court found Georgia's punitive damages law not to violate the First Amendment. Thus, the Court has the benefit of its prior decisions in this area, decisions more valuable than an express decision by the plurality of the court below.

To the foregoing decisions of this Court, add *Fay v. Parker*, 53 N.H. 342 (1873), where the court examined the extant decisions and concluded that "[p]unitive damages destroy every constitutional safeguard within their reach." *Fay*, 53 N.H. at 397. With *Fay*, compare the dissent in the case at bar as arguing in favor of the constitutionality of punitive damages (J.S. App. A-12). See also *Abel v. Conover*, 170 Neb. 926, 931, 104 N.W.2d 684, 689 (1960).

And to the foregoing authorities add the following: Beckman, *Constitutional Issues in Insurance Claim Litigation*, 22 Tort & Ins. L.J. 244 (1987); Ghardi & Kircher, *Punitive Damages Law and Practice*, § 3.01-3.07 (1985); Grass, *The Penal Dimensions of*

Punitive Damages, 12 Hastings Const. L.Q. 241 (1985); Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986); Leitner, *Punitive Damages: A Constitutional Assessment*, 38 Fed'n Ins. & Corp. Couns. Q. 119 (1988); Reisberg, *In Defense of Punitive Damages*, 55 N.Y.U. L. Rev. 303 (1980); Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269 (1983); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chi. L. Rev. 408 (1967); Comment, *Punitive Damages: The Burden of Proof Required by Procedural Due Process*, 22 U.S.F. L. Rev. 99 (1987).[6]

The authorities are ample so that the absence of a decision by the plurality of the Supreme Court of Georgia discussing the validity of Georgia's punitive damages statute will not hinder this Court in reaching a decision in this case.

Lastly, O.C.G.A. § 51-12-5.1, cited by Wright (Motion to Dismiss, p. 11), is applicable only to causes of action arising after July 1, 1987. It is not applicable here and will not be applicable at retrial. If anything, that revision shows that the Georgia legislature recognized that the statute in issue here was unjust, if not unconstitutional. Ground two (2) of Wright's Motion to Dismiss therefore should be denied.

C.

In ground one (1) of its Motion to Dismiss, Wright argues that this appeal should be dismissed because the judgment of the Supreme Court of Georgia sought to be appealed is not final. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), sets forth the categories of cases in which judgments are deemed to be final within the meaning of 28 U.S.C. § 1257. This case falls within the

---

[6]Messrs. Beckman, Grass and Wheeler would be shocked to hear that Wright needed only thirteen words to conclude that "This is not a criminal case; the principles sought by appellant do not apply." (Motion to Dismiss, p. 7). See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963).

first and fourth categories recognized in *Cox* and within *Cox* itself.

"In the first category are those cases in which there are further proceedings — even entire trials — yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, *supra*, 420 U.S. at 479. Here the federal issue is conclusive.

Also, this case fits within the fourth *Cox* category and within *Cox* itself. Here, as in *Cox*, "The Georgia Supreme Court's judgment is plainly final on the federal issue and is not subject to further review in the state courts. Appellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all." 420 U.S. at 485.

It is true that *Cox* involved freedom of the press, but freedom of the press does not impact upon finality within the meaning of 28 U.S.C. § 1257. On the other hand, as in *Cox*, there is serious doubt as to the constitutionality of punitive damages according to the opinions of this Court, ***Aetna Life Ins. Co. v. Lavoie***, 475 U.S. 813, , 106 S.Ct. 1580, 1589 (1986); ***Bankers Life and Casualty Co. v. Crenshaw***, U.S , 108 S.Ct. 1645, 1651, 1655-56 (1988), and many litigants, lawyers and judges are awaiting a decision by this Court on the constitutional validity of punitive damages.[7]

---

[7]Forty five states allow recovery of punitive damages, subject to limitations and conditions in some states, while five states forbid their recovery (Louisiana, Massachusetts, Nebraska, New Hampshire and Washington). Peterson, Sarma, & Shanley, ***Punitive Damages: Empirical Findings***, 1 n.1, Rand Corp., Institute for Civil Justice, Report No. R-3311-ICJ (1987). O.C.G.A. § 51-12-5 in issue here was codified from the common law. See Editorial Note, Ga. Code Ann. § 105-2002 (Harrison 1968). Hence, the laws in those forty-five states which allow recovery of punitive damages are likely to be affected to a greater or lesser degree by the decision in this case.

Moreover, Colonial should not be subjected to retrial under an unconstitutional statute because retrial itself denies Colonial its due process and equal protection rights against double jeopardy (to wit: a second trial to impose punishment). See *Abney v. United States*, 431 U.S. 651 (1977).[8]

---

[8]Wright argues that Colonial is raising its double jeopardy argument for the first time on this appeal (Motion to Dismiss, p. 7). This defense did not exist prior to the remand of this case by the court below for retrial as to punitive damages. Moreover, the double jeopardy defense could be timely raised in the trial court upon remand and hence it certainly can be raised before that time in this Court in urging that probable jurisdiction should be noted and as being fairly encompassed in the other due process and equal protection issues being raised.

The decision of the court below is final within the meaning of 28 U.S.C. § 1257. Wright's Motion to Dismiss therefore should be denied and probable jurisdiction should be noted.[9]

August 12, 1988

Respectfully submitted,

* HAROLD N. HILL, JR.
KENNETH L. KARLBERG
HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
1400 Peachtree Place Tower
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Attorneys for Appellant

* Counsel of Record

Of Counsel:
ROSS ARNOLD
ARNOLD & HOPKINS
Suite 1607
3400 Peachtree Road, N.E.
Atlanta, Georgia 30326
JAMES V. DAVIS
LANDAU, DAVIS AND FARKAS, P.C.
Albany Towers, Suite 300
P.O. Box 128
Albany, Georgia 31702
EDGAR A. NEELY, III
RICHARD B. NORTH, JR.
NEELY & PLAYER
Haas-Howell Building
75 Poplar Street
Atlanta, Georgia 30303

---

[9]A dismissal of this appeal could mislead the lower courts, both state and federal. See *Hicks v. Miranda*, 422 U.S. 332 (1975).